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NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

FRED RAYMOND FIELDS,
Petitioner

v.

IDA ELAINE G. FIELDS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTION PRESENTED

1. Whether Petitioner can attack the validity of an alimony decree that continues to be enforced by the State of Georgia in violation of the Equal Protection clause of the Fourteenth Amendment?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

The petitioner Fred Raymond Fields respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Georgia entered in this proceeding on April 8, 1981.[1]

OPINION BELOW

The opinion of the Supreme Court of Georgia has been reported. *Fields v. Fields*, ____Ga.____, 276 S.E.2d 614 (1981). The opinion also appears in the Appendix hereto. No opinion was rendered by the Superior Court of Muscogee County, Georgia.

1. There are no parties to this case other than those named on this page and on the cover.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on April 8, 1981 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Ga. Code § 30-201 (as it appeared in 1966, it was amended in 1977 and repealed in 1979):

> Definition. Permanent and temporary.—Alimony is an allowance out of the husband's estate, made for the support of the wife when living separate from him. It is either temporary or permanent.

Ga. Code Ann. § 6-701.1:

> (a) Appeals in the following types of cases shall be as provided in this section:
>
> (1) Appeals from decisions of the superior courts reviewing decisions of the Workers' Compensation Board, Auditors, State and local administrative agencies, and lower courts by certiorari or de novo proceedings: Provided, however, this provision shall not apply to decisions of the Public Service Commission and probate courts, and cases involving ad valorem taxes and condemnations.
>
> (2) Appeals from judgments or orders granting or refusing a divorce or temporary or permanent alimony, awarding or refusing to change child custody, or holding or declining to hold persons in contempt of such alimony or child judgment or orders.
>
> (b) All appeals taken in cases specified in subsection (a) above shall be by application in the nature of a petition enumerating the errors to be

urged on appeal and stating why the appellate court has jurisdiction. The application shall specify the order or judgment being appealed, and if such order or judgment is interlocutory the application shall set forth, in addition to the enumeration of errors to be urged, the need for interlocutory appellate review.

(c) The applicant shall include as exhibits to the petition a copy of the order or judgment being appealed, and should include a copy of the petition or motion which led directly to the order or judgment being appealed and a copy of any responses to such petition or motion. An applicant may include copies of such other parts of the record or transcript as he deems appropriate. No certification of such copies by the clerk of the trial court shall be necessary in conjunction with the application.

(d) Such application shall be filed with the clerk of the Supreme Court or Court of Appeals within 30 days of the entry or order, decision or judgment complained of a copy of such application, together with a list of those parts of the record included with the application, shall be served upon the opposing party or parties as provided by law, except that such service shall be perfected at or before the filing of the application, but when a motion for new trial, or a motion in arrest of judgment, or a motion for judgment notwithstanding the verdict has been filed, the application shall be filed within 30 days after the entry of the order granting, overruling, or otherwise finally disposing of the motion.

(e) The opposing party or parties shall have 10 days from the date on which the application is filed in which to file a response. The response may be accompanied by copies of the record in the same manner as is allowed with the application. The response may point out that the decision of the trial

court was not error, or that the enumeration of error cannot be considered on appeal for lack of a transcript of evidence or for other reasons.

(f) The Supreme Court or Court of Appeals shall issue an order granting or denying such an appeal within 15 days of the date on which the response of the opposing party or parties is filed with such court or within 25 days of the date on which the application was filed in the event that no response is filed.

(g) Within 10 days after an order is issued granting such appeal, the applicant, to secure a review of the issues, shall file a notice of appeal as provided by law. The procedure thereafter shall be the same as in other appeals.

(h) The filing of an application for appeal shall act as a supersedeas to the extent that a notice of appeal acts as supersedeas.

STATEMENT OF THE CASE

By decree entered on November 10, 1966 the Superior Court of Muscogee County, Georgia ordered Fred Raymond Fields to pay his former wife, Ida Elaine G. Fields, permanent alimony in the amount of $250.00 per month. The decree was entered pursuant to the then applicable Ga. Code § 30-201 which placed the burden of alimony exclusively upon the husband.

Gender-based alimony statutes were held unconstitutional by this Court in *Orr v. Orr*, 440 U.S. 268 (1979). In response to this decision Fred Raymond Fields filed a petition for writ of error coram nobis in the Muscogee County Superior Court attacking the validity of the alimony decree on federal constitutional grounds and asking the court to decide whether substantive state law required

him to continue his alimony payments. This petition was filed on July 22, 1980.

The Muscogee County Superior Court dismissed Mr. Fields' petition in an order issued without opinion and filed on January 28, 1981. The dismissal was appealed to the Supreme Court of Georgia. The Supreme Court dismissed the appeal, holding that the federal constitutional challenge should have been raised in 1966, under a procedural rule that requires extraordinary motions for new trials to be filed within 30 days after entry of the judgment being challenged.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW UPHOLDS CONTINUED ENFORCEMENT OF AN ALIMONY DECREE ENTERED IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The alimony decree being challenged in this case was entered under a Georgia statute that placed the burden of alimony exclusively upon the husband. That statute defined alimony as "an allowance out of the husband's estate, made for the support of the wife when living separate from him." Ga. Code § 30-201 (repealed 1979). The trial court which entered this decree was not empowered to consider the ability of the wife to support her husband.

Alimony decrees entered in such a gender-based context are unconstitutional. In *Orr v. Orr,* 440 U.S. 268 (1979) the husband challenged the validity of an alimony decree entered under such a gender-based statute. The decree was originally the product of a stipulated agreement be-

tween the husband and wife. Because such statutory schemes provide that different treatment be accorded on the basis of sex, the decree was held to be unconstitutional and the case was remanded for the state courts to consider whether the alimony payments were justifiable on gender-neutral grounds. 440 U.S. at 283-84.

The facts in this case are similar to those in *Orr v. Orr*. The Georgia statutory scheme for alimony was also held unconstitutional in the wake of the *Orr* decision. *Stitt v. Stitt*, 243 Ga. 301, 253 S.E.2d 764 (1979). Petitioner merely asked the Muscogee County Superior Court to decide whether continued alimony payments could be justified on gender neutral grounds under substantive state law. The court refused to reconsider an alimony decree unquestionably arrived at pursuant to an unconstitutional statutory framework. This refusal, and the dismissal of petitioner's appeal by the Supreme Court of Georgia, continues to enforce an order entered in violation of the Equal Protection clause of the Fourteenth Amendment.

II. THE DECISION BELOW DOES NOT REST ON AN ADEQUATE INDEPENDENT STATE GROUND.

The Supreme Court of Georgia dismissed petitioner's appeal for failing to follow the procedures prescribed in Ga. Code Ann. § 6-701-1. Since petitioner filed an appeal with the Supreme Court that raised the federal question and described the judgment being contested, the only procedural obstacle beyond "an arid ritual of meaningless form," *Staub v. City of Baxley*, 355 U.S. 313, 320 (1955), is the failure to raise the constitutional challenge within thirty days after entry of the original alimony decree in November 1966. This is further evident from the cases

which the court below cited in support, both of which refer to appeals dismissed for failure to raise the claim, not for defects of form. *See Hanes v. Hanes,* ____Ga. ____, 276 S.E.2d 4, 5 (1981); *Chandler v. Cochran,* ____Ga.____, 275 S.E.2d 657, 657 (1981). The failure to raise a sex discrimination challenge to this alimony statute in 1966, well prior to any of the development of the law in this area, is not an adequate state ground barring review by this Court.

At the outset it is important to remember that the views of the Georgia courts are not dispositive on this question. "The issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts." *Street v. New York,* 394 U.S. 576, 583 (1969). There are two principal reasons why this state ground is inadequate to prevent federal constitutional relief.

First, the state procedural rule does not afford a reasonable opportunity for assertion of the federal right. The general rule was stated by Justice Holmes:

> [T]he assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. . . . If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds.

Davis v. Wechsler, 263 U.S. 22, 24-25 (1923). This places an affirmative duty upon the state to provide a reasonable opportunity for the federal claim to be heard

and decided by the state courts. *See Central Union Telephone Co. v. City of Edwardsville,* 269 U.S. 190, 194-95 (1925).

It is plainly unreasonable for the state to hold that petitioner should have raised this sex discrimination claim in 1966. This would force petitioner to have anticipated this Court's extension of the Equal Protection clause to gender-based classifications, an extension which did not occur in any case until 1971, five years after this alimony decree was entered. *See Reed v. Reed,* 404 U.S. 71 (1971). The standard of review used in *Orr* to overturn gender-based alimony was the "substantial relation to governmental objectives" test. *Orr v. Orr,* 440 U.S. at 279. This test was not applied to gender-based classifications until 1976, ten years after entry of petitioner's alimony decree. *See Craig v. Boren,* 429 U.S. 190 (1976). Of course, the specific holding that gender-based alimony was unconstitutional did not occur until 1979. Certainly it is unreasonable to expect petitioner to have anticipated future developments in federal constitutional law which were still several years from fruition at the time the alimony decree was entered. In other words, the state court claims that petitioner forfeited his federal claims years before those claims even came into existence. This does not afford a reasonable opportunity to assert the federal right.

This Court has held that when constitutional rights are recognized by the Court for the first time only after state time limits have expired the state procedural default does not preclude relief on the understandably belated federal claim. In *O'Connor v. Ohio,* 385 U.S. 92 (1966), the defendant claimed that the prosecutor's comments on his

failure to testify were unconstitutional under *Griffin v. California,* 380 U.S. 609 (1965). O'Connor had never raised this claim in the state courts because *Griffin* was not decided until after O'Connor's state appeals had already been exhausted. The Supreme Court remanded back to Ohio. The Ohio court upheld the conviction solely because O'Connor never raised his constitutional claim in the state courts. This Court reversed, holding that the defendant could not be charged with anticipating the *Griffin* decision. 385 U.S. at 93. The Court stated: "his [O'Connor's] failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court." *Id.*

A similar result was reached in *Turner v. Arkansas,* 407 U.S. 366 (1972). In *Turner* defendant appealed from his conviction on double jeopardy grounds and the Arkansas court affirmed. Shortly afterward, this Court decided *Ashe v. Swenson,* 397 U.S. 436 (1970), a decision which applied to Turner's case. Turner again sought review and the Arkansas court again affirmed, this time on state procedural grounds requiring that the state court not relitigate the law of the case. This Court ruled, without further explanation, that "the rejection of petitioner's claim by the Arkansas Supreme Court on procedural grounds does not foreclose an inquiry on this case." 407 U.S. at 368.

O'Connor v. Ohio holds that where state procedural rules effectively prevent vindication of newly created federal rights the procedural obstacle will not be allowed to preclude federal relief. As in *O'Connor,* this petitioner could not have anticipated future creation of a federal right and the state procedural rule cannot subsequently

deprive him of that right. Such a rule does not give a reasonable opportunity to present that federal claim.

The state procedural ground does not foreclose federal review for a second reason. Operation of the rule in this fashion deprives petitioner of property without due process of law. Petitioner was ordered to pay permanent alimony stemming from a proceding in which he could not have legally presented evidence showing his wife's duty to support him. When that duty was recognized, years later, it became a violation of due process to continue to make payments without being given the opportunity to present the evidence he originally should have been allowed to present.

This Court has recognized such a due process test for adequacy of a state procedural obstacle. In *Saunders v. Shaw*, 244 U.S. 317 (1917) the defendant in a civil action could not introduce evidence at trial because the plaintiff's evidence the defendant wished to refute was itself inadmissible. On appeal the plaintiff's evidence was declared admissible and judgment was entered for the plaintiff. Defendant sought a rehearing to assert that the court should allow in his evidence, now that it was admissible, before rendering judgment for plaintiff. The court rejected this claim because procedural rules prohibited the rehearing. The Supreme Court reversed, considering the state court's ruling to be a denial of due process.

The best explanation of this doctrine in terms applicable to this case was in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930). In *Brinkerhoff-Faris* the plaintiff challenged local taxes as violative of equal protection. The state court dismissed plaintiff's claim for

failure to exhaust state administrative remedies. Plaintiff appealed to the Supreme Court, arguing that the reason it had not used the administrative remedies was because the prior law had clearly been that such remedies did not exist. The Supreme Court reversed, holding that the state procedural rule in such a context denied due process in the "primary sense of an opportunity to be heard and to defend its substantive right." 281 U.S. at 678.

Petitioner in this case equally believed that he had no right to gender-neutral consideration of alimony and therefore he did not assert his federal claim in 1966. The state procedural rule thus deprives him of his right to escape an unconstitutionally exclusive burden and, significantly, deprives him of his right to be heard on what effect a mutual duty would have on his decree. To exercise his right to be heard on this issue, the state court requires that petitioner have asserted a right he could not have known he possessed. This brings our case directly under the holding in *Brinkerhoff-Faris.* As Justice Brandeis wrote in that case:

> If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction. . . . Thus, by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property."

281 U.S. at 679. The continuing deprivation of petitioner's property without due process and in violation of the Equal Protection clause of the Fourteenth Amendment justify the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Georgia.

Respectfully submitted,

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APPENDIX

Opinion of Court Below

Fred Raymond FIELDS

v.

Ida Elaine G. FIELDS.

No. 37415

Supreme Court of Georgia.

April 8, 1981

PER CURIAM.

Be decree dated November 10, 1966, the court ordered the former husband to pay $250 per month alimony pursuant to agreement of the parties. In July 1980 the former husband filed a petition for writ of error coram nobis challenging the validity of the decree incorporating the agreement on the basis of *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979).

The trial court granted the former wife's motion to dismiss. See *Kosikowski v. Kosikowski*, 243 Ga. 413(3), 254 S.E.2d 363 (1979); *Kirkpatrick v. Woodruff*, 243 Ga. 736, 256 S.E.2d 465 (1979); *Knox v. Knox*, 243 Ga. 797, 256 S.E.2d 777 (1979); *Shepherd v. Shepherd*, 244 Ga. 545(1)(2), 261 S.E.2d 339 (1979). The former husband filed notice of appeal.

The former writ of error coram nobis has been superseded in this state by the extraordinary motion for new

trial. *Wayne v. State,* 239 Ga. 871, 873, 238 S.E.2d 923 (1977). Whether treated as a writ or error coram nobis, an extraordinary motion for new trial [Code Ann. § 81A-160(d)], or a complaint in equity to set aside a judgment [Code Ann. § 81A 160(e)], this appeal is dismissed for failure to follow the application procedures set forth in Code Ann. § 6 701.1. *Chandler v. Cochran,* ____Ga.____, 275 S.E.2d 657 (1981); *Hanes v. Hanes,* ____Ga.____, 276 S.E.2d 4 (1981).

Appeal Dismissed.

All the Justices concur.